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No. 03-288

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

BRONX LEGAL SERVICES
and QUEENS LEGAL SERVICES,

Petitioners,

v.

LEGAL SERVICES CORPORATION
LEGAL SERVICES FOR NEW YORK CITY, and
LEONARD KOCZUR, Acting Inspector General
of the Legal Services Corporation,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF

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REPLY TO THE GOVERNMENT'S STATEMENT OF THE QUESTIONS PRESENTED

The government states that the first question presented by this Petition is "[w]hether petitioners' *contracts* with LSNY require petitioners to furnish *client names*." Gov't Br. at (i) (emphasis added). This is an incorrect statement of the issue presented for two separate reasons. *First*, Petitioners never objected to providing LSNY and the IG-LSC with *client names*. What they objected to, and what the courts below ruled they were required to reveal, was *client secrets*. *Second*, the basis for the decision of the courts below was not that disclosure of client secrets was required by contract, but that it was required *by law* (Section 509(h) of the 1996 Omnibus Appropriations Act). If the sole basis for requiring disclosure of the information at issue had been the contracts, then summary judgment would have been inappropriate because Petitioners had alleged other factual and legal grounds that would have precluded summary judgment on the contract claim. The only valid basis on which the judgment below can be explained (as is clear from the memorandum decision of the district court) is that the disclosure at issue was required by law.

REPLY TO RESPONDENTS' STATEMENTS OF THE CASE

1. LSC asserts that "[t]his case is about Petitioners' refusal to provide information required by a valid administrative subpoena." LSC Br. at 1. That is incorrect. At no time were Petitioners ever served with a subpoena. On March 22, 2000, the IG-LSC served an administrative subpoena on Respondent LSNY; however, neither that subpoena, nor any other subpoena, was ever served on Petitioners, nor were Petitioners ever joined as parties to the subpoena enforcement proceeding that was brought against LSNY in the District of Columbia. Furthermore, after Petitioners commenced the present proceeding in the

Southern District of New York, the IG-LSC specially moved in the D.C. proceeding for "clarification" that the enforcement order that had been entered against LSNY in the D.C. proceeding applied to Petitioners as well. The D.C. court promptly and squarely denied this motion, stating the government's "motion for clarification is denied. The subpoena requires *LSNY* to produce documents in *its* possession, custody or control" (emphasis added). Contrary to LSC's assertion, therefore, this case is not about refusal to provide information required by an administrative subpoena.

2. The government states that "the Inspector General constructed a 'Chinese wall' separating the client names from the problem codes so that it would not be possible to link a particular client to the subject matter of the representation." Gov't Br. at 4 (citing *United States* v. *LSNY*, 249 F.3d 1077, 1080 (the subpoena enforcement proceeding against LSNY)). The possible use and effect of this procedure, however, was never litigated in the present proceeding and was not in any way relied upon as a basis for the decision here. Moreover, if given the opportunity, Petitioners would have contended that this procedure was both inappropriate and inefficacious.

3. The decision of the D.C. courts in the subpoena enforcement proceeding brought against LSNY (*see* Gov't Br. at 4-5) is not relevant here. The only issue decided in that proceeding was whether the subpoena issued to LSNY should be enforced, not whether LSNY had an obligation to disclose client secrets apart from the subpoena. In contrast to what happened to LSNY, no subpoena was ever issued to Petitioners. This is significant because compliance with a valid subpoena is one of the exceptions under the disciplinary rules that would have permitted Petitioners to disclose the client secrets at issue.

ARGUMENT

I. Section 509(h) Does Not Require Petitioners To Make The Disclosures At Issue Here

A. Section 509(h) Requires Disclosure of Client Names, Not Client Secrets

The government and LSC argue (and the courts below held) that Petitioners are required to disclose the *client secrets* at issue here because Section 509(h) of the 1996 Omnibus Appropriations Act requires that "financial records, time records, retainer agreements, client trust funds and eligibility records, *and client names* . . . be made available to any auditor or monitor of the recipient" (emphasis added). As explained in the Petition, however, Section 509(h) merely requires recipients of LSC funds to disclose client names, *not client secrets*.[1] In contrast, Section 2996(e)(3) of the LSC Act explicitly provides in clear and unequivocal language that "the Corporation [LSC] *shall not*, under any provision of this subchapter, ***interfere with any attorney in carrying out his professional responsibilities to his client as established in the Canons of Ethics and the Code of Professional Responsibility*** . . ." 42 U.S.C. § 2996e(3) (emphasis added). Since New York's disciplinary rules (as well as the ethical rules of most other states) prohibit attorneys from disclosing client secrets except under limited circumstances, there was no valid reason for the courts below to have interpreted Section 509(h) as requiring disclosure of client secrets.

The fallacy made by the courts below is vividly demonstrated by the government's own recitation of the basis for the decision. Thus, the government states, "[t]he court held

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1. As noted above, Petitioners never objected to providing LSNY and the IG-LSC with client names. What they objected to was providing client names together with the associated problem codes which revealed the subject matter of the representation.

that even assuming that client names constitute 'client secrets' under New York disciplinary rules, those rules permit a lawyer to reveal *client secrets* when 'required by law or court order.'" Gov't Br. at 5.-6. The government then continues, "[b]ecause Section 509(h) requires disclosure of the *client names*, the court concluded such disclosures are "required by law." *Id.* at 5. This is a non-sequitor. The fact that Section 509(h) requires disclosure of *client names* does not signify that it also requires disclosure of *client secrets*.

B. It Was Unreasonable To Interpret Section 509(h) As Requiring Disclosure of Client Secrets

Even if it is assumed that Section 2996(e)(3) and Section 509(h) are deemed to be inconsistent, it was unreasonable for the courts below to conclude that Congress intended to change the substantive law of the LSC Act when it enacted the 1996 Appropriations Act. As explained in the Petition, it is well established that repeals by implication are not favored and this is especially true when the provision advanced as the repealing measure was enacted in an appropriations bill.

Accordingly, the conclusion reached by the courts below that Section 509(h) of the 1996 Appropriations Act requires recipients of federal LSC funds to disclose *client secrets* (as opposed to *client names*) is clearly erroneous and should be reversed.

II. As Interpreted And Applied By The Courts Below, Section 509(h) Of The 1996 Appropriations Act Is Unconstitutional

A. The Constitutional Challenges To Section 509(h) Are Properly Before This Court

The government states that "Petitioners do not contend that the court of appeals erred in failing to decide the constitutional challenges." Gov't Br. at 9. This is not correct. The basis for both the district court's decision and the circuit court's affirmance of that decision was that disclosure of the client secrets at issue was "required by law." Although the circuit court went on to indicate in its opinion "there are no genuine issues of fact concerning [petitioners'] duties under the contract" (App. A 4a), and therefore "we . . . need not consider . . . plaintiffs' constitutional claims" (*Id.*), this was erroneous. Petitioners had, in fact, raised factual issues concerning their duties under the contract. The district court did not reach these issues because it concluded that the disclosure at issue was required by law. If, as petitioners claimed, Section 509(h) was found to be unconstitutional, then there would have been a factual dispute as to whether Petitioners were obligated to make the disclosures under the contract. It was essential, therefore, for the court of appeals to rule on the constitutional issues.

B. The Separation of Powers Issue

The government argues that the "separation of powers" doctrine is not applicable here because that doctrine only applies to separate branches of the federal government, whereas the conflict here is between *federal* statutory law (Section 509(h) of the Omnibus Appropriation Act) and *state* judicial power (regulation of attorneys). This is not a valid distinction, however, because state disciplinary rules and professional qualifications apply equally to attorneys who practice in both state and federal

courts. In invoking the separation of powers principle in *Legal Services Corp.* v. *Velazquez*, 531 U.S. 533, 545-46 (2001) (which also involved a legal challenge under the LSC Act), this Court did not limit application of the doctrine to attorneys practicing in federal court.[2] Furthermore, the LSC Act itself explicitly provides that it was not intended to "abrogate as to attorneys in programs assisted under this subchapter the authority of a State or other jurisdiction to enforce the standards of professional responsibility generally applicable to attorneys in such profession." 42 U.S.C. § 2996(e)(3).

The government and LSC also argue that Section 509(h) does not intrude into the attorney-client relationship because the "Disciplinary Rules expressly permit attorneys to reveal 'client secrets' when 'required by law or court order.'" Gov't Br. at 9; *see also* LSC Brief at 4. As explained in the Petition, however, this is circular, tautological reasoning that is both illogical and invalid. It is illogical to say that all attorneys have an ethical obligation to preserve client secrets and then say that it is permissible for LSC-funded attorneys (and only LSC-funded attorneys) to disclose clients' secrets because Congress says they may do so. In effect, Congress would be saying that an ethical obligation that applies to all attorneys generally does not apply to attorneys who receive LSC funds. This clearly creates two classes of attorneys and unduly infringes on the prerogative of the judiciary to regulate attorneys.

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2. LSC attempts to distinguish *Velazquez* on the ground that it concerned "Congress' ability to impose viewpoint-based limits on the arguments a lawyer could make on behalf of a client" (LSC Br. at 4). This is a distinction without a difference. *Valazquez* is relevant here because the Court ruled in that case that Congressional restrictions on attorneys pursuant to the LSC Act may violate the separation of powers principle.

C. The First Amendment Issue

Respondents argue that requiring attorneys who receive LSC funds to disclose their clients' secrets does not run afoul of the First Amendment because "when the government funds the furnishing of services, it is entitled to ascertain the recipients of those services." Gov't Br. at 10; *see also* LSC Br. at 5. Even if this is so, it does not justify requiring disclosure of client secrets. Moreover, the government's request for information in the present case was far more extensive and intrusive than was reasonable or necessary. To justify such an encroachment, case law requires that there be a clearly demonstrated and compelling state need. *See Baird* v. *State Bar of Arizona*, 401 U.S. 1, 6 (1971). No such showing was made here. Indeed, Petitioners submitted substantial evidence in opposition to the motion for summary judgment which established that the request at issue was both unnecessary and unreasonable.

D. The Due Process Issue

The government argues that the "doctrine of unconstitutional conditions" is not relevant here because "when Congress funds a program it has broad authority to ensure that those funds are spent in a way that furthers the purposes of that program." Gov't Br. at 11 (citing *Rust* v. *Sullivan*, 500 U.S. 173 (1991). In making this argument, the government simply ignores the problem. Obviously, Congress has broad authority to ensure that funds are spent in a way that furthers the purposes of that program. What Congress may not do, however, is condition the receipt of such funds on waiver of a constitutional right. For the reasons explained in the Petition, legal service clients have a constitutional right of association under the First Amendment to consult with an attorney without unreasonable government interference. Petitioners submitted substantial proof in opposition to the motion for summary judgment which showed that the interference here (disclosure of client secrets)

was both unnecessary and unreasonable, thus implicating the doctrine of unconstitutional conditions.

E. The Equal Protection Issue

Finally, the government and LSC assert that Plaintiffs' equal protection argument fails because "indigence is not a suspect status that triggers any heightened equal protection review." Gov't Br. at 11; LSC Br. at 6. In making this argument, however, Respondents ignore the particular grounds stated in the Petition as to why the Equal Protection clause is violated here.

III. Section 104 Of The Inspector General Act Amendments Of 1988 Is Unconstitutional

A. The "Appointments Clause Issue" Is Properly Before This Court

The government argues that "petitioners did not raise [the Appointments Clause] issue in either the district court or the court of appeals." Gov't Br. at 12. This is not accurate. Petitioners consistently argued in both the district court and in the court of appeals that Section 104 of the Inspector General Act Amendments of 1988 was unconstitutional because it impermissibly delegated the government's subpoena powers to the IG-LSC. Petitioners initially argued that the delegation was improper because the IG-LSC was a private individual appointed by a private corporation (LSC). In response, the government argued that the IG-LSC is not a private citizen, but an officer of the United States. *See* IG-LSC Second Circuit Brief at 54. Petitioners then pointed out that

> unlike the inspector generals of federal agencies, who are appointed by the President by and with the advice of the Senate (see 5 U.S.C. App. 3 § 3), the inspector general of LSC is appointed by the head of the LSC (see 5 U.S.C. App. 3 § 8G(c) [SPA-87]) and he

> 'reports to' and is 'under the general supervision of' the head of LSC, a private corporation. *Id.* § 8G(d) [SPA-87].

See Petitioners' Second Circuit Reply Brief at 24. Thus, Petitioners directly raised the issue of whether the IG-LSC was properly appointed in accordance with the Appointments Clause.

Furthermore, even if the Appointments Clause issue had not been explicitly raised in the courts below (which it was), that would not prevent this Court from considering the issue. As this Court stated in *Freytag* v. *Commissioner of Internal Revenue*, 501 U.S. 868, 878-79 (1991), in agreeing to hear an Appointments Clause challenge that had not been previously raised in the courts below:

> This Court in the past, however, has exercised its discretion to consider nonjurisdictional claims that had not been raised below [citations omitted]. *Glidden* [*Co.* v. *Zdanok*, 370 U.S. 530, 536-36 (1962)] expressly included Appointments Clause objections to judicial officers in the category of nonjurisdictional structural constitutional objections that could be considered on appeal whether or not they were ruled upon below.

B. The IG-LSC Is A "Principal Officer" Of The United States

The government argues that the IG-LSC is not a "principal officer" of the United States under *Edmond* v. *United States*, 520 U.S. 651 (1997) because he "reports to and is under the general supervision of" LSC's Board of Directors (Gov't Br. at 13). This contention is invalid for the reasons explained in the Petition. First, the IG-LSC performs the same functions and exercises the same statutory powers as the IGs of other government agencies, all of whom are principal officers of the

U.S. appointed by the President with the advice and consent of the Senate. Second, contrary to the government's argument, the IG-LSC is not "directed and supervised" within the meaning of *Edmond* by others who were appointed by the President with the advice and consent of the Senate. Indeed, the IG Act explicitly provides that "[t]he head of the designated Federal entity shall *not* prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any subpoena during the course of any audit or investigation." 5 U.S.C. App. 3 § 8G(d) (emphasis added).

C. Even If The IG-LSC Is Deemed To Be An "Inferior Officer" Of The U.S., His Appointment By LSC's Board of Directors Was Still Constitutionally Invalid

Even assuming for purposes of argument that the IG-LSC is an "inferior officer" of the United States, his appointment by LSC's Board of Directors was still contrary to the Appointments Clause since that Board is not a "Head of Department" within the meaning of Article II, § 2, Cl. 2. *Freytag*, 501 U.S. at 886 (holding that the term of "Head of Department" as used in the Appointments Clause must be confined "to executive divisions like the Cabinet-level departments"). The government's argument that the reasoning of *Freytag* does not apply to LSC is completely unfounded. The explicit constitutional limitations imposed by the Appointments Clause apply to all government entities. *Cf. Lebron* v. *National Railroad Passenger Corp.*, 523 U.S. 374 (1995).

CONCLUSION

Petitioners respectfully request that this petition for a writ of certiorari be granted.

Respectfully submitted,

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